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Testimony on:

Senate Bill 326 – Civil and Criminal Penalties Regarding Use of Public Funds

Presented to:

House Judiciary Committee

By:

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Robert M. Day, Director

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SB 326 – Civil and Criminal Penalties Regarding Use of Public Funds

Chair O'Neal and Committee Members, my name is Dr. Robert Day, and I am the director of the Division of Health Policy and Finance, the single state agency responsible for administering the Medicaid program. I want to thank you for the opportunity to share with you some of the implications of provisions in SB 326 regarding false claims that have come to my attention since the bill's introduction earlier in the session.

Having run the Medicaid program as its director from 1999-2004, and now managing the state employee health insurance program as well, I understand the need to provide all the necessary tools to prevent fraud and abuse in the Medicaid program. Kansas Medicaid is a large and important program – a very complex program to operate. On average, the program processes 40,000 medical claims every day, seven days a week, and will reimburse providers in excess of $2 billion this year for services rendered to nearly 400,000 Kansans. The number and variety of services that may be provided to our beneficiaries is staggering: standard medical care now includes approximately 16,000 different procedures or products, 200,000 different pharmaceutical products, over 100,000 unique medical diagnoses. The definition of standard or medically necessary care changes constantly, presenting the Medicaid program with decisions about coverage and benefits on a continual basis.

In a mechanical sense, payment for medical services is administered primarily through the electronic Medicaid Management Information System (MMIS), which evaluates, or "adjudicates," claims for Medicaid reimbursement. The rules governing these payments are set out in broad terms in state and Federal law, but are operationalized in a series of contractual relationships between the Federal government and the state, and between the state and providers. The state's participation in the Federally-funded Medicaid program is based on a contract with the Center for Medicare and Medicaid Services (CMS), i.e., the Medicaid "state plan." The state is engaged in contracts with several thousand providers who have agreed to provide services to Medicaid customers. Deviations from these contractual arrangements constitute an administrative application of discretion in managing the program, but they are not illegal. Section 2 of SB 326 would endow these contractual relationships with the status of law, criminalizing any deviations from the explicit terms of the contracts.

The difficulty with SB 326 is that it is predicated on the assumption that the law, i.e., Medicaid payment policy, can be perfectly and completely represented in written form, contract or an automated payment system. This is an interesting hypothesis, and we are unable to answer the question of whether it might be possible to codify Medicaid payment policies completely. In practice, private insurance plans and state Medicaid programs do not attempt such complete codification, but instead rely in part on administrative processes to operationalize payment policies.

Our own staff routinely apply administrative discretion to operate the Kansas' Medicaid program, and this discretion has led to a number of important decisions to deviate from codified payment policies. Recent

examples of administrative discretion in Kansas Medicaid include:

- Covered prescription drugs for seniors eligible for both Medicaid and Medicare for several weeks following implementation of Medicare Part D drug coverage [*Federal and state law stipulated that drug coverage would end January 1, 2006, but by mutual and public– though not codified – agreement, this restriction was delayed until February 8th to ensure access to medically necessary drugs*].
- Covered Vitamin D for premature twin babies [*Medicaid does not cover vitamins*].
- Covered replacement medications for a beneficiary who had lost the drugs to a house fire [*Medicaid does not allow early refills for medication*].
- Covered the purchase of a replacement inhaler for a child who had lost it [*Medicaid does not allow early refills for medication*].
- Covered the purchase of replacement medications for a beneficiary whose drugs were stolen [*Medicaid does not allow early refills for medication*].
- Covered four dental cleanings per year for a beneficiary with oral cancer [*Medicaid only pays for two dental cleanings per year*].
- Covered a compounded (custom-mixed) drug for a baby with cystic fibrosis [*Medicaid does not cover all drugs*].
- Covered an additional three months of physical therapy for a beneficiary with bilateral mastectomy and adhesions from radiation therapy burns [*Medicaid covers six months of physical therapy*].
- Allowed a cochlear implant procedure to be performed in Wichita [*Medicaid allows cochlear implants at KU Medical Center in Kansas City*].
- Covered a continuous positive airway pressure (CPAP) machine for a child [*Medicaid does not cover CPAP machines*].
- Covered robotic therapy for a stereostatic reduction of a brain malformation for medical necessity [*Medicaid does not cover this service*].
- Covered inguinal hernia repair for females for medical necessity [*Medicaid does not cover this service for females*].

Without the ability to apply some administrative discretion in the operation of the Medicaid program, the state will not be able to provide these sorts of unusual and often unpredictable medically necessary services to beneficiaries.

Recommendation: To ensure that the Kansas Health Policy Authority is able to fulfill the statutory mission of the Medicaid program, we recommend that Section 2 be deleted.

Thank you for the opportunity to share my concerns about this bill. I would be happy to answer any questions the committee might have.